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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

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No. 402.

MONTANA MINING COMPANY, LIMITED, PLAINTIFF IN ERROR,

vs.

ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

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This case has been called so frequently to the attention of this court that a very short statement of facts will suffice.

The defendant in error was plaintiff in an action at law, in the United States court for the district of Montana. The action was brought in 1893, for damages for ore extracted from a vein of the said plaintiff dipping beneath the surface ground of the said defendant. The first complaint, filed in 1893, is not in the original record nor a part of the record, nor can it properly be made a part of the record, for the reason that this is a writ of error to the circuit court of appeals and not to the circuit court for the district of Montana. The original complaint was not a part of the record in the circuit court of appeals, and this court will take the record of that court as it stood there, not remake, or re-form, or re-prepare any part of the record of the circuit court of appeals.

The amended complaint, upon which the trial was had, was filed June 26, 1899. The defendant in that case, plaintiff in error, did not make any objection to the filing of that amended complaint, but took issue with it. Damages were claimed in that complaint down to the date of its filing.

It is immaterial whether this action is called one of trespass and a claim for recovery for ores taken, or whether it is called trover or conversion for the ore, the nature of the action is the same. No claim for damages is made for the mere entry upon the land or its disfigurement or injury. The whole claim for damages is for the conversion of the ore. In this view, there is no distinction in the measure of damages or nature of the action. In the State of Montana the title to land cannot be tried by trespass. The title can only be determined by ejectment or bill to quiet title. So that nothing can be involved in this case except the mere value of the ore, the amount of the verdict in this case.

The trial which we now review was had in June and July, 1905. The defendant in error contends that there are no Federal questions involved and this court is without jurisdiction on this writ. This branch has been so fully discussed that it will not be reviewed again. We wish to add to that brief, however, the following cases:

Boston M. Co. *vs.* Boston O. Purchasing Co., 188 U. S., 632-638.
S. C., 85 Fed., 867.
S. C., 93 Fed., 274.
Robinson *vs.* Anderson, 121 U. S., 522.

The plaintiff's complaint alleges the apex of an ancillary, or what the statute calls "other," vein extending from the 520-foot plane drawn parallel to the north end line of the St. Louis mining claim to another plane, called for convenience the 108-foot plane, and then adds as an extra description by itself 25 feet more of the said vein between the 108-foot plane and the 133-foot plane. The figure (Rec-

ord, page 4) fully explains these. The vein has its apex wholly within the St. Louis, between the first two named planes. It has its apex partly within the St. Louis, between the 108 and 133-foot planes. The St. Louis is the older claim; was located first and patented first.

ARGUMENT.

I.

The plaintiff in error has stated in a brief in original No. 13 the Federal questions which its counsel deem are involved in this writ. They will probably be repeated here. We answer to them all, upon the merits, by citing the single case of Walrath *vs.* Champion Mining Co., 171 U. S., 293. The language of that case has been quoted so often that it seems almost improper to requote it; but it should be before us at all times, so I quote from pages 307 and 308:

"This court in Del Monte Mining Co. *vs.* Last Chance Mining Co., decided at the present term, *ante*, 55, reviewed the cases we have cited, and speaking for the court, Mr. Justice Brewer said:

" 'Our conclusion may be summend up in these propositions: First, the location as made on the surface by the locator determines the extent of rights below the surface; second, the end lines, as he marks them on the surface, with the single exception hereinafter noticed, place the limits beyond which he may not go in the appropriation of any vein or veins along their course or strike; third, every vein, 'the top or apex of which lies inside of such surface lines extended downward vertically,' becomes his by virtue of his location, and he may pursue it to any depth beyond his vertical side lines, although in so doing he enters beneath the surface of some other proprietor; fourth, the only exception to the rule that the end lines of the location as the locator places them establish the limits beyond which he may not go in the appropriation of a vein on its course or strike is where it is developed, that, in fact, the location has been placed not along, but across the course of the vein. In such case, the law

declares that those which the locator called his side lines are his end lines, and those which he called end lines are in fact side lines, and this, upon the proposition that it was the intent of Congress to give to the locator only so many feet of the length of the vein, that length to be bounded by the lines which the locator has established of his location. Our laws have attempted to establish a rule by which each claim shall be so many feet of the vein lengthwise of its course, to any depth below the surface, although laterally its inclination shall carry it ever so far from a perpendicular.' Mining Company *vs.* Tarbet, 98 U. S., 463-468.

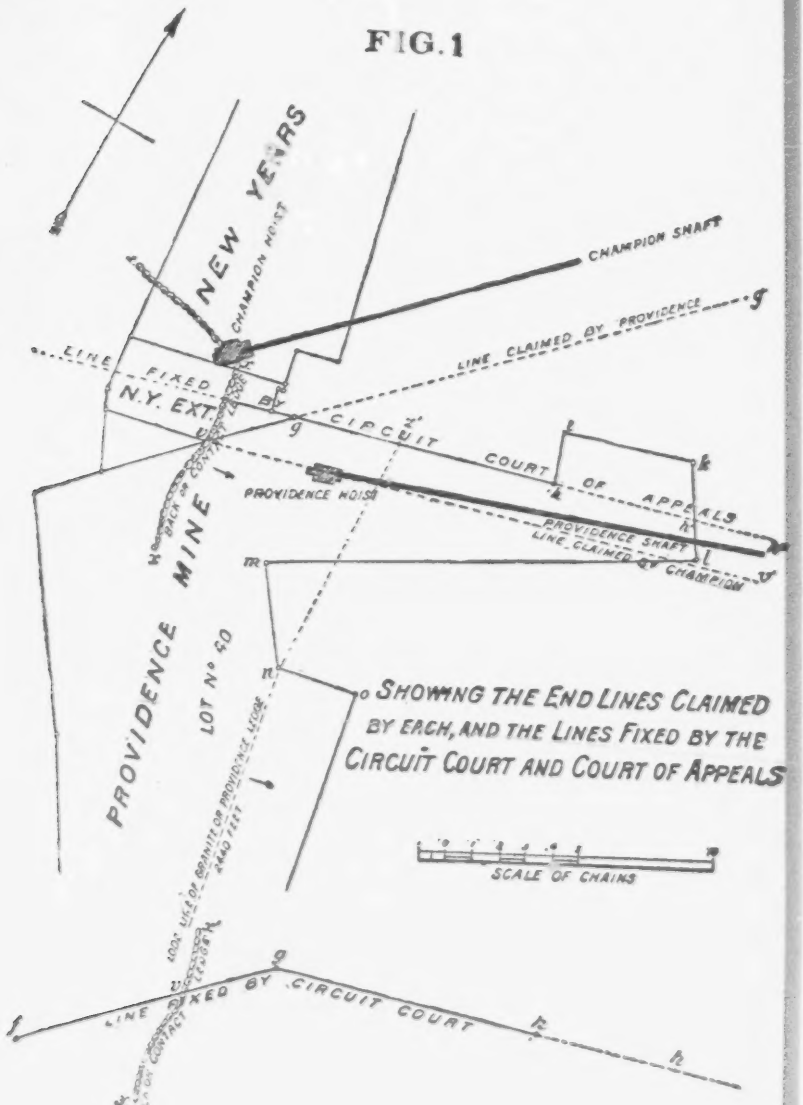
"These propositions we affirm, with the addition that the end lines of the original veins shall be the end lines of all the veins found within the surface boundaries."

The meaning of that case, as applied to this, is that we are entitled to follow outside our side lines all veins having the same dip, same direction, which apex within our premises to the extreme limit of the discovery vein of the St. Louis. Judge Hunt put that condition to the plaintiff's right to recover in his charge, and the jury have found with us, that the discovery vein extends from the 520-foot plane to the 133-foot plane. (See Judge Hunt's charge, Record, page 92; original, 186.) Taking it, then, as an established fact that the St. Louis discovery vein runs lengthwise of the claim and extends from one plane to the other, 520 to 133, we had a right to follow the Drum Lummon or incidental vein through that distance, even if a part of the apex was not within our claims. (Refer to the figure of the Walrath case at page 295, here re-produced.) This court in that case gave to the Providence mining claim a line covering the incidental vein, though a part of it (v–h) extended beyond and outside of the premises of the Providence.

II.

The right of the plaintiff, St. Louis Company, to follow its vein, although it enters at the side line and departs through the same side line, has been established by this court in other

FIG. 1


NEW YEARS
CHAMPION HOIST
CHAMPION SHAFT
LINE
FIXED
BY
N.Y. EXT.
LINE CLAIMED BY PROVIDENCE
CIRCUIT
COURT
OF
APPEALS
PROVIDENCE HOIST
PROVIDENCE SHAFT
LINE CLAIMED BY CHAMPION
PROVIDENCE MINE
LOT N° 40
SHOWING THE END LINES CLAIMED BY EACH, AND THE LINES FIXED BY THE CIRCUIT COURT AND COURT OF APPEALS
SCALE OF CHAINS
LINE FIXED BY CIRCUIT COURT

cases, the only condition being that the general direction of the claim be with and along the vein. That proposition has been settled, not only here, but in a variety of Federal decisions. It was first raised here in the case of Last Chance *vs.* Tyler, 157 U. S. There was an intimation in that case that where the claim and vein were substantially in the same direction the owner of the apex could recover ores on the dip under another claim. The case was determined on other questions and it was not finally disposed of. The Del Monte case, 171 U. S., 84 *et seq.*, finally disposed of the whole question in favor of our present contention.

2 Lindley on Mines, sec. 584 (2d ed.).

III.

Between planes 108 and 133 the vein passes, or is alleged to pass, from the St. Louis into the Nine Hour claim of the defendant. Passing at an angle, of course the apex would be partly within and partly without the St. Louis. The St. Louis claims no right to follow the surface or any of the surface of the Nine Hour, but, going to the deep on that vein for that 25 feet, the St. Louis says that the ore belongs to it because it, being the older claim, takes the whole of the vein. The vein is indivisible, a unit, an entity. Its width is not uniform, is never uniform in any vein. The ores cannot be divided by any longitudinal demarcation or division. We claim the general rule as laid down by Judge Field in the Argentine case, 122 U. S., 484:

"If there was an apex or outcropping of the same vein within the surface of the boundaries of the claims of the defendant, that company could not extend its workings under the Adelaide location, that being of earlier date. Assuming that on the same vein there were surface croppings within the boundaries of both claims, the one first located necessarily carried the right to work the vein."

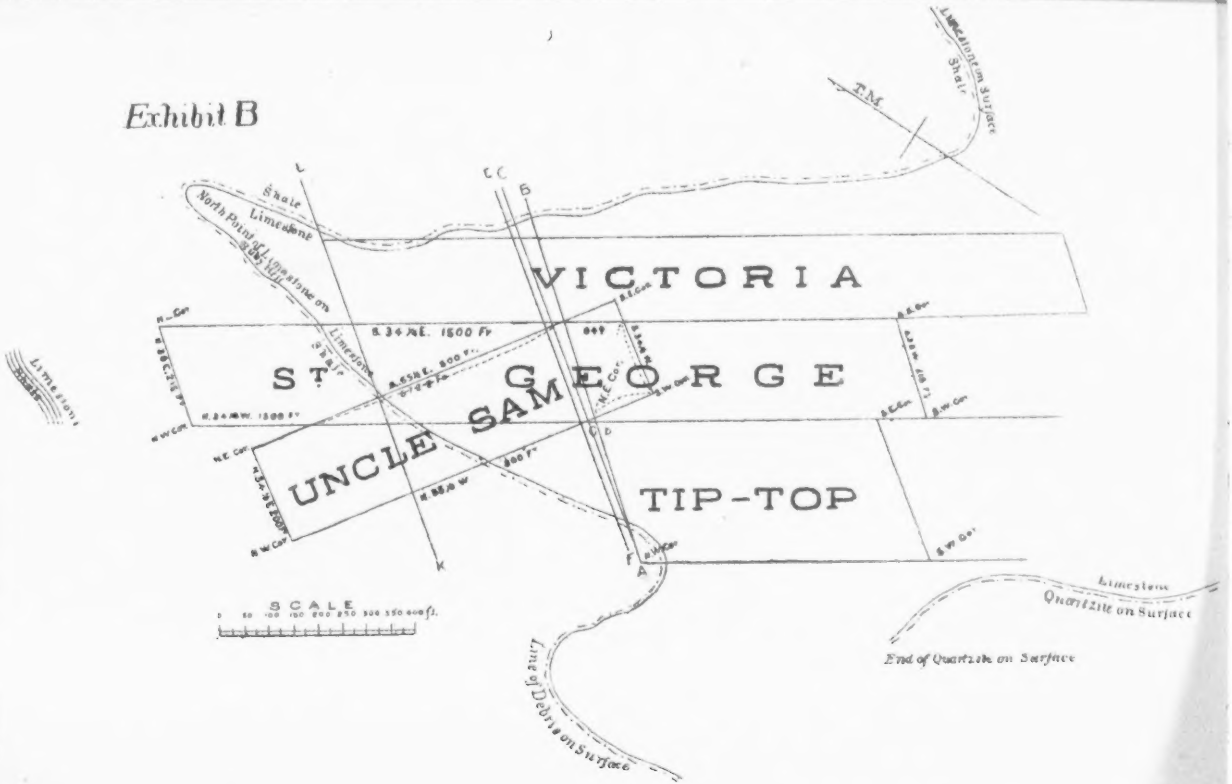
The first time the question was raised in this court was in the Rose-Richmond litigation, 17 Nevada, 26; 114 U. S., 586. In that case the first location was the Uncle Sam. Subsequently the St. George was located. The St. George applied for patent. The Uncle Sam filed an adverse claim. The suit was allowed to slumber without being pushed by either side. Pending that procedure, the Victoria was located, patent applied for, and patented. The victoria was on the same vein as the Uncle Sam and St. George, which had litigation, but did not have a surface conflict with it. The Supreme Court of Nevada held that the patent to the Victoria was void. The Supreme Court of the United States affirm that decision and say:

"But without deciding the question of their right to pursue the vein under ground as against a prior valid location, by reason of the earlier date of patent, we concur with the Supreme Court that the right to that part of this very vein being in contest between these parties in reference to the Uncle Sam and St. George claims, the decision of this controversy cannot be rendered nugatory by the introduction of a new claim by one of the parties, whose claim of right from the government for this same location is initiated while this litigation is going on. The parties were all in court. The subject-matter was before the court. The thing to be decided was the right of the conflicting claims to this lode. This was within the jurisdiction of the court, and any patent issued to one, or the other, or both these parties, under this proceeding for this property, must relate back to the date of their claims, and override the new patent. This result cannot be defeated by producing this new patent to destroy it. The claim was initiated by a party to this suit *pendente lite,* and must abide the result of the litigation in this case."

To properly appreciate this case we should have before us the diagram at page 45 of 17th Nevada.

Following the decision of this court in the Rose case, the Supreme Court of Utah gave a very full and careful examination of this question in the Bullion Beck Mining Co.

Exhibit B


T.M.
Limestone on Surface
Shale
L
CC
B
Shale
North Point of Limestone
Limestone
VICTORIA
N. Cor.
S. 34 NE. 1500 Ft
S.E. Cor.
S.W. Cor.
ST. GEORGE
Limestone
S. 63 NE. 800 Ft.
N.E. Cor.
S.W. Cor.
S. 24 W. 1500 Ft
N.W. Cor.
N.E. Cor.
UNCLE SAM
D
N. 24 W. 1500 Ft
N. 66 W. 800 Ft
S.W. Cor.
TIP-TOP
S.W. Cor.
K
A
SCALE
0 50 100 150 200 250 300 350 400 ft.
Limestone Quartzite on Surface
End of Quartzite on Surface
Limit of Debris on Surface
Little Point
Shale

vs. Eureka Mining Co., 5 Utah, 49 to 55. Many decisions of the Federal courts have determined the rule in our favor.

St. Louis *vs.* Montana, 104 Fed., 667.

Bunker Hill M. Co. *vs.* Empire State M. Co., 106 Fed., 472.

Empire State M. Co. *vs.* Bunker Hill M. Co., 114 Fed., 419.

Last Chance M. Co. *vs.* Bunker Hill M. Co., 131 Fed., 572.

Empire State M. Co. *vs.* Bunker Hill Co., 131 Fed., 591.

And finally and very ably in the case of U. S. M. Co. *vs.* Lawson, 134 Fed., 774.

2 Lindley on Mines, secs. 583 and 594 (2d. ed.).

In the case of Bunker Hill *vs.* Empire State, etc., 106 Fed., 472, Judge Beattie, of the Idaho district, very clearly discusses this question:

"The Viola and San Carlos are parallel to each other, are located along the course of the ledge, and each has within its surface a portion of the apex. The Viola, being the older, would, by the weight of authority, take the whole ledge. If this court had any doubts on that proposition, it still would be controlled by the late decision in St. Louis Min. & Mill. Co. *v.* Montana Min. Co., 104 Fed., 664, by the circuit court of appeals of this circuit. The wisdom of the decision is illustrated in this case; for if a ledge can thus be divided longitudinally between two parallel claims, a locator could do what defendant claims in this case,—so locate two parallel claims upon the same apex as to have them follow the ledge upon oblique dips in different directions, thus taking the ledge on the underground for a much greater length than owned of the apex, which is in direct conflict with that vital principle of the mining law, the parallelism of those lines or planes which cross the ledge. * * * There can be but one reasonable solution of this perplexing problem, and that is that the senior location, having within its surface a part of the width of the apex, shall own the entire width.

The Viola, being senior to the San Carlos as well as to the Likely and Skookum, owns, as to all those claims, the entire ledge."

IV.

In all briefs and arguments of counsel for plaintiff in error much stress is laid upon the effect of a deed from the owners of the St. Louis to the owners of the Nine Hour of what is known as the "compromise strip." It does not seem possible that any Federal question can be connected with it, although counsel for plaintiff in error insist there is; but what or how is not apparent. The plaintiff in error has also asked for a writ of certiorari to the circuit court of appeals, evidently not daring to rest upon its so-called Federal questions on writ of error. Such writ of certiorari (it is claimed) would raise this question of that deed, reviving the ground again of that litigation and the circumstances and effect of it.

The owners of the St. Louis mining claim applied for patent for it, as the older of the locations. This application was way back in the early eighties. Two of the then owners of the Nine Hour, who were Robinson, Huggins, Sterling *et al.*, filed an adverse claim in the land office and brought suit upon it in the usual manner, alleging the area in conflict and asking judgment for the ground in conflict. After the suit was filed the parties got together and settled the suit by a contract (Exhibit "A," Record, pages 9 and 45). Charles Mayger, the owner of the St. Louis, proceeded and got his patent; but before Mayger got his patent, Robinson, Huggins, and Sterling had deeded the Nine Hour claim as an entity and a "claim" to the Montana Mining Company, Limited. When the patent was obtained the Montana Mining Company demanded the deed. Mayger for a number of defenses refused to execute the deed, and among them was the claim that he had himself procured an assignment from the contractors on the other side, he apparently believing that it was

simply a case of contract. The Montana Mining Company, Limited, filed a suit in the State court. The complaint is found at Record pages 41-44. As the Montana Mining Company was not the assignee of that contract, it was apparent that it could not recover its specific performance unless the contract was so connected with the Nine Hour claim as to pass with it by deed; and so they alleged (Record, page 42; original, 44):

"That thereupon, on the 7th day of March, A. D. 1884, to settle and compromise the said suit and adverse claim and for the purpose of settling and agreeing upon the boundary line between the said Nine Hour Lode mining claim and the said St. Louis mining claim said Charles Mayger executed and delivered to said Robinson, Huggins and Sterling Exhibit 'A.'"

Again, at the fourth paragraph of their complaint, page 43; original, 86:

"And plaintiff further shows and states that by mesne conveyance the title to the said Nine Hour Lode mining claim and the whole and every part thereof, including the portion thereof above particularly mentioned and described, has come to it, and it is now the owner thereof and in the possession and entitled to the possession of the whole and every part of said Nine Hour Lode mining claim."

Again, at page 44; original, 87:

"The said defendant, The St. Louis Mining and Milling Company of Montana, had full knowledge and notice of the making, execution and delivery of the said bond for a deed by its said codefendant and of the rights and equities of plaintiff thereunder as being the *successor in interest* of the said Robinson, Huggins, Sterling and its other grantors."

The court found with the plaintiffs in that action and made findings (Record, pages 50-51). These findings were necessary under the law of Montana and constitute a part of the decree.

Finding 2 is "that the strip of ground called the 'compromise ground,' which is the subject of dispute in this action, was at that time and thereafter continued to be a part of the Nine Hour Lode mining claim" (Record, page 50; original, 99).

Finding 5, page 51; original, 101:

"That at the date of the execution of the said bond, the said Robinson, Huggins and Sterling, Eddy and De Camp were in the actual possession of the said compromise strip and that they and their successors in interest have ever since remained in the possession thereof, claiming and holding the same as a part of the said Nine Hour Lode mining claim."

Again, finding No. 8, page 52; original, 101, the court found:

"It was the intention of the parties to the deeds to convey as well their interests in said compromise strip as every other part and parcel of the said Nine Hour Lode mining claim."

Thus it will be seen that there never was any contract or intention to contract to SELL any property, but SIMPLY TO FIX THE BOUNDARY LINE BETWEEN THE ST. LOUIS AND THE NINE HOUR. The St. Louis was to be and continue to be a mining claim, with all the rights of a mining claim, retaining the right to go underneath other claims. The Nine Hour was to continue to be a single mining claim, and the compromise strip was simply fixed to establish the boundary of it. On this trial counsel for plaintiff in error attempted to reinstate that adverse suit of the early eighties and put in such evidence as possibly might have been proper at that time. This was offered for the purpose of overthrowing the opinion of the circuit court of appeals in this cause (102 Fed., 432). The present plaintiff in error had brought that suit, had drawn that complaint and the findings to suit itself, and now is seeking to set it aside for the purpose of extending, enlarging, and changing its effect and meaning. No

authority has ever been cited for such a procedure and I apprehend none can be. It needs but the statement of the case to explain the whole judgment-roll and the judgment-roll explains it. The deed was given in pursuance of a decree upon that contract and is not to be considered as a contractual deed, because the parties did not have any intention at all with regard to executing a deed. It was prepared by the court as a part of its decree and entered as an execution. Defendant in that case was forced to sign to obtain an appeal and to prevent contempt proceedings. The only *intention* of the parties is to be determined by the original Exhibit "A" (Record, pages 9 and 45).

That intention was determined in the judgment and record of the so-called Specific Performance case, and the contract and intention merged therein. They are not open for consideration in this case.

The pleadings, findings of fact, and conclusions of law in the case constitute a complete answer to the claim now made, that it was the intention of the parties to the contract that the conveyance should embrace the ore in controversy in this action. A full and fair statement of the facts in the case was made by Mr. Chief Justice Fuller when the case was before the Supreme Court of the United States, to which reference is hereby made (171 U. S., 650). It appears from the complaint in the case that the compromise ground was the *entire area* in conflict between the Nine Hour and the St. Louis claims; that Mayger applied for a patent to the St. Louis claim, and in the survey he caused to be made of his claim he included a part of the Nine Hour Lode mining claim; that thereupon an action was commenced to determine the right to the possession of the compromise ground; that afterwards, "to settle and compromise the said suit and adverse claim and for the purpose of settling and agreeing upon the boundary line between the said Nine Hour Lode mining claim and the said St. Louis Lode mining claim," the

bond for a deed or contract in question was executed and delivered.

The right of the plaintiff was not based upon any contractual relation with Mayger or the St. Louis Company. There is no allegation of any assignment of the interests in the contract by either of the contracting parties. The plaintiff based its right to a conveyance upon the fact of its ownership of the Nine Hour claim.

It was because of this position taken by the plaintiff in the so-called Specific Performance case and the theory upon which it had succeeded in obtaining a judgment that the case was taken to the Supreme Court of the United States by the St. Louis Company. In the opinion of the Supreme Court of the United States (171 U. S., 650) it is said:

"The proposition of plaintiffs in error is that where an application to enter a mining claim is made, and there is embraced therein land claimed by another, it is the duty of the latter to file an adverse claim and thereafter bring in some court of competent jurisdiction an action to determine the right to the area in conflict, which action must be prosecuted to a final judgment or dismissed; and that no valid settlement can be made by which such adverse claimant can acquire any interest in the ground when thereafter patented by the applicant. We are not aware of any public policy of the Government which sustains this proposition."

In the opinion of the Supreme Court of the State in the case (20 Mont., 405) it is said:

"What did the parties do? In order to settle a costly and troublesome lawsuit they entered into a compromise, by which they settled the title among themselves to the ground in dispute and fixed the boundary line between their two claims."

The case was litigated to a conclusion in the Supreme Court of the United States upon the theory advanced by the plaintiff in the case, that the compromise ground was

always a part of the Nine Hour claim, and the purpose of the arrangement resulting in the bond for a deed was to settle and establish the boundary line between the St. Louis and Nine Hour claims. This theory is wholly inconsistent with the idea that the owners of the Nine Hour claim were to receive more by the conveyance than they would have obtained if a patent had been issued to them for the compromise ground as a part of the Nine Hour claim. The plaintiff in the case took the position that by the conveyance of the Nine Hour claim it had acquired the equitable title and right to the possession of the compromise ground and was entitled to a conveyance of the legal title, which had been acquired by Mayger, as trustee for the owners of the Nine Hour claim. Whether or not the compromise ground had been located as a part of the Nine Hour claim or as a part of the St. Louis claim was distinctly an issue in the case, and the court found that it was always a part of the Nine Hour claim, and that by reason of this fact and the arrangement made whereby title was to be taken by Mayger, with the understanding that the same would be conveyed, the plaintiff was entitled to the conveyance. The action was in fact an action to declare and enforce a trust, although termed an action for specific performance. The case stands the same as where A purchases real estate and for some reason directs that the title should be transferred to B, to be held in trust for A. In view of these considerations, it is apparent that the Montana Company only acquired, by the judgment and the conveyance made in pursuance thereto, the legal title to the compromise ground to which it and its grantors always held the equitable title. The judgment conclusively estops the Montana Company from claiming more than its grantors would have received if the patent to the Nine Hour claim had included the compromise ground.

During the second trial of this case in the court below evidence was offered for the stated purpose of showing the intention of the parties to the contract to convey, in order

that the contract might be construed in accordance with such intention. Error was assigned upon the refusal of the court to receive such evidence. There are several conclusive reasons in support of the action of the circuit court with reference to this matter. The purpose of the evidence was to establish that it was the intention of the parties that the ore in controversy in this case, although in a vein which has its apex within the St. Louis claim, was intended to be conveyed, thereby disproving the allegations in the complaint in the so-called Specific Performance case upon which judgment had been recovered. This was not permissible.

In the case of Davis *vs.* Wakelee, 156 U. S., 680, the court said:

"It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him."

The Montana Company having recovered a judgment in the case, it is now estopped from disputing what it then asserted in order to secure such judgment. Let us assume that the position which it took in the case was because the St. Louis Company had acquired the interests of three of the parties to the contract. If, then, it had claimed under the contract, it could have only acquired an undivided interest in the compromise ground. Now that its interests have change, it should not be allowed to treat the conveyance as a conveyance of a part of the St. Louis claim.

In construing that instrument, including all the other subsequent papers, we must remember:

"That the language used is to be construed with reference to the peculiar property about which the parties were contracting."

Richmond Mining Co. *vs.* Eureka Mining Co., 103 U. S., 846.

"The peculiar property" that we were contracting about, then, is the subject to which we must direct our attention. It was not only a mining property, but it was also a mining property which was "a part of the Nine Hour mining claim." It is contended by the plaintiff in error that the words contained in that deed are capable of two meanings—meaning which gives a vertical line on the westerly side of the compromise ground and another meaning which gives a line parallel to the vein on the other side of the compromise ground. The expression in the deed so often referred to is part of the general printed clause in such a deed:

"Together with all the dips, spurs, and angles and also all the metals, ores, gold and silver bearing quartz rock and earth therein, and all the rights, privileges and franchises thereto incident, appended or appurtenant, or therewith usually had and enjoyed."

and is capable of more than one meaning. Was it intended to convey by vertical lines, as in the case of agricultural lands? or was it intended to convey only such ores as the Nine Hour claim would have been entitled to had there not been a wrong survey across a part of its area? or was it intended to convey that which wholly or in part apexed within said claim? Three or four different meanings may be given to this language, all entirely consistent with its terms.

The phrase "the metals, ores, gold and silver bearing quartz rock and earth therein and all the rights privileges and franchises thereto incident, appended or appurtenant or therewith usually had and enjoyed" limits and not extends the grant. No vein or ores were *"appurtenant"* to that property or usually had or enjoyed therewith, except such as had its apex entirely within the compromise strip.

In Merriam *vs.* United States, 107 U. S., 437, the syllabus is:

"In construing contracts, a court may look not only to their terms, but to their subject-matter and the surrounding

circumstances, and avail itself of the same light which at the time of making them the parties possessed."

In Doe *vs.* Burt, 1 T. R., 701, the court said:

"The only question is whether the court is absolutely bound by the terms of this lease to put the construction on it for which the defendant contends. Now, it seems to me, that the construction of all deeds must be made with a reference to their subject-matter. * * * In the present case, considering the nature of the property, it was proper to let in evidence to show the state and condition of it at the time when the lease was granted. *Prima facie*, indeed, the property in the cellar would pass by the demise, but that might be regulated and explained by circumstances. Therefore I am of opinion, that, considering all the circumstances of this case, it was proper to receive the evidence at the trial, which, when received, proved that the cellar was not intended to be passed by the demise to the defendant."

In the case of Brawley *vs.* United States, 96 U. S., 173, the court says:

"Previous and contemporary transactions and facts may be properly taken into consideration to ascertain the subject-matter of a contract and the sense in which the parties may have used particular terms, but not to alter or modify the plain language which they have used."

When this deed, contract, and record are viewed in the light of the circumstances in which the parties were placed, to wit, the original controversy between the Nine Hour and the St. Louis, the purpose for which the suit for specific performance was brought, the fact that the owners of the Nine Hour were permitted to recover without any deed of conveyance or assignment from the persons to whom the contract for the compromise ground was given, the findings of the court in the Specific Performance case, and the decision of the court thereon—all these together show conclusively that the deed of the little strip known as the "com-

promise ground" conveyed nothing more than just a part of the Nine Hour claim; that the St. Louis did not deed, and therefore reserved, all the rights it would have had had the claim been surveyed originally to and including its present boundaries. That was the intent of the parties. The Nine Hour never paid for or claimed any part of the vein or any vein belonging to the St. Louis mining claim. *All that had its apex within the St. Louis belonged to it and had belonged to it and had never been contracted to be conveyed,* and by no sleight of hand or skill in wording of conveyance could it be considered to be transferred to the Nine Hour claim.

St. Louis M. & M. Co. *vs.* Montana M. Co., 171 U. S., 653.

What would be the rights of these parties had the owners of the St. Louis owned the whole of the Nine Hour and had conveyed the whole of the Nine Hour? Would it convey any of the St. Louis in doing it? A conveyance of the Nine Hour would only carry the conveyance of the Government, and the owners of the Nine Hour would own only the surface and the veins which have their apex therein. A deed from private parties for the Nine Hour would reserve, as the patent from the United States would reserve, the right of all persons, including the grantor, to enter underneath the premises upon a vein having its apex within their own land and extract ore therefrom.

The patent for lands of the United States Government is construed with reference to the properties conveyed and in obedience to law; and whatever language used conveys simply what the language of the law conveys, section 2322, viz., the surface ground and all veins having their apex therein, and that is all that is given by the law of Congress, and not more.

Deffeback *vs.* Hawke, 115 U. S., 392-406.
Davis's Adm'r *vs.* Weibold, 139 U. S., 506.

The case of Richmond Mining Company *vs.* Eureka Mining Co., 103 U. S., 839, entirely supports our contention. The Potts Chamber involved in that litigation was upon the dip of the vein far outside of all the premises, if considered at the time of the original compromise. A deed dividing the premises along the course of the vein was held to carry not only the surface, but also the dip of the vein. It was vertical in its application lengthwise of the vein, but on the dip of the vein it was held to carry the whole vein. The circumstances were entirely different from this. To make it applicable here, there should have been a controversy as to the length of the apex by these parties, and a division along the strike of the apex would have been held to carry the dip also, and, as quoted above, the language used with regard to a mining deed is to be construed with regard to the peculiar property about which the parties are contracting.

Neither does the case of Stinchfield *vs.* Gillis, in the 96th and 107th California, sustain the contention of the plaintiff in error, and, moreover, the deed in that case was not made under the circumstances which surround the execution of the deed in the case under review. In that case Gillis had been in possession of a large tract of mineral land. He conveyed a part of it by bargain and sale deed, with implied warranty. One vein apexed in the part sold and another vein apexed in the part retained by Gillis. These two veins united on their dip within the surface boundary lines of the part conveyed. It will appear from the facts stated in the 107th California that the defendant claimed that the land had been located under two locations, and that the part retained was the prior location.

We quote:

"At the former appeal herein it was held that if the locator of a mining claim should convey a portion of his claim without any reservation in his deed of conveyance, his grantee would be entitled to all the gold that might be found within

the ground conveyed in any vein whose apex was within the surface lines of his deed; so, if a locator should convey to A the east half of his claim, and afterwards should convey the west half to B, each of the grantees would in the same manner be entitled to all of the gold found in any vein which was entirely within the surface lines of his conveyance; and, on the same principle, if the proprietor of a tract of mining ground which has been derived through several locations should dispose of the same in parcels, irrespective of the lines of such locations, the rights of his grantees would be measured by the terms of their deeds. In such cases section 2336 of the Revised Statutes of the United States has no application. That statute was not intended to limit or define the rights of a person in mere possession of a tract of mining ground where there is more than one vein, or to prescribe the effect of a conveyance by the locator of a claim of a portion of his location containing one of such veins. The object of the statute was to supplement the provisions of section 2332, and to prescribe rules under which different locations by different proprietors should be held, and to determine the rights of such proprietors in case of intersecting veins. At the date of the passage of that act, May 10, 1872, the Carrington claim was and had for many years been held as a single claim, without any adverse claim thereto, and it continued so to be held until the conveyance by Gillis to the plaintiff in 1886. The position of the proprietor of a mining claim who conveys a portion thereof, and retains the remainder, is analogous to the position of the United States after it has issued its patent for a location. As the United States, as well as a subsequent locator, hold the unpatented claim subject to the prior rights of the patentee, as prescribed by section 2336, so the grantor of a portion of his claim, in the absence of any reservation in his deed, or proof of mining customs, holds the ungranted portion subordinate to the rights of his grantee in the ground conveyed. * * *

"In thus holding, we conceded that, when mining ground is conveyed by deed without express limitation, the grantee takes subject to the characteristics of mining property given to it by prevailing customs and law, and not with the absolute dominion which flows from a conveyance in fee of ordinary land. The mining land thus granted is still subject to all mining laws and customs which are applicable, but the provision of section 2336 that, when two veins intersect,

'priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection,' cannot possibly be applied to the case where A conveys part of his mining claim to B, for in such a case there is no 'prior location.' Therefore, in such a case, the ordinary rules which govern grants of land must of necessity apply; and, if the intersection takes place on part of the claim conveyed, the grantee takes all the mineral within the space of intersection.

"Whether the plaintiff would have been entitled to follow the west vein into the ground retained by Gillis, and to claim the gold found therein, or whether Gillis would have been entitled to any of the gold that might be found in the Rice vein, within the ground conveyed to the plaintiff, are questions which are not involved in this appeal, and upon which we do not express any opinion. All that we hold is that, inasmuch as the gold in question was within the ground conveyed by Gillis to the plaintiff, and in a vein whose apex was within the surface lines of that ground, it belonged to the plaintiff." * * *

"So, if a locator should convey to 'A' the east half of his claim, and afterwards should convey the west half to 'B,' each of his grantees would, in the same manner, be entitled to all of the gold found in any vein which was entirely within the surface lines of his conveyance."

We will add a portion of the opinion of the circuit court of appeals in the former hearing of the case, 102 Fed., 432:

"The controversy between the owners of the St. Louis and the Nine Hour claims was one which involved the surface lines only. No dispute had arisen concerning the ores beneath the surface. The owners of the Nine Hour claimed nothing more than that the eastern side line of the St. Louis, as it was surveyed, encroached upon their territory. They based their adverse action upon that contention. The compromise was an admission that their claim was just. When the suit was brought for the specific performance of the compromise contract, it was brought by the successors in interest of those who had represented the Nine Hour claim at the time of the compromise. The plaintiffs therein were not the assignees of the contract. They maintained the suit solely as owners of the Nine Hour claim, and upon the theory that

the strip of land so contracted to be conveyed was a portion of the Nine Hour claim. All these antecedent circumstances leading up to and culminating in the deed are properly considered in determining what was the intent of the parties to the contract. If the adverse action which was brought by the owners of the Nine Hour claim had gone to trial, and had resulted in a judgment fully sustaining their contention, the result would have been to fix a surface line of division between the two claims, without affecting rights to the ore beneath the surface otherwise than as they are controlled by the mining laws of the United States. The owners of the St. Louis claim would still have retained the right to follow their vein extralaterally in its dip beneath the surface of the strip of land which was the subject of the conveyance. Upon what theory can it be said that the owners of the Nine Hour claim acquired more by the conveyance which was made to compromise the action than they could have acquired by a judgment in the action itself, fixing the boundary upon the very line which they contended was the true line? It is not to be supposed that the owners of the St. Louis claim intended, by the compromise contract, not only to surrender the whole of their contention concerning the true location of the boundary line, but also to divest their claim of its extralateral rights,—rights that had not been in litigation, and had not been assailed by the owners of the adjoining claim. To manifest such an intention, the terms of the contract and of the conveyance would, under the circumstances, need to be clear and explicit. The use of the words 'together with all the minerals therein contained' is not sufficient. Those words so inserted in the contract and in the deed are not more inclusive or more significant than the words universally employed in grants of mining claims, 'together with dips, spurs, angles and also all the metals, ores, etc., therein.' "

V.

If the certiorari were to be granted and the case come here as it stood before the circuit court of appeals, we have discussed now all the questions except a few trifling ones as to admissibility of evidence, and which it will not be necessary to review, and some exceptions to the charge as to the use of

the word "satisfaction." We clip a small portion of one of the briefs used in the circuit court of appeals:

The fifth instruction (Record, page 91) reads as follows:

"The plaintiff must show a right of recovery. This applies as well to the question of extralateral rights on the Drumlummon vein in dispute, and upon its discovery vein, as the question of damages. But if the plaintiff makes a *prima facie* case by its evidence, and the presumptions of law applicable to the situation, that it has extralateral rights to its discovery vein, between the 520 and 133 foot planes, and therefore to that part of the Drumlummon vein in dispute, then the defendant must overcome this *prima facie* case and these presumptions by showing to the satisfaction of the jury that plaintiff has no extralateral rights."

It is said that by the use of the word "satisfaction" in this instruction the court required the plaintiff in error to furnish a higher degree of proof than the law demands.

When this instruction is construed in connection with the other parts of the charge, it will be seen that there is no ground for the criticism made. In the first part of instruction 5 the court said:

"The plaintiff must show a right of recovery. This applies as well to the question of extralateral rights on the Drumlummon vein in dispute, and upon its discovery vein, as the question of damages."

In the 14th instruction (Record, page 94) the court told the jury that the "burden of proof is upon the plaintiff to show by a preponderance of evidence its ownership, the amount of ore extracted, and its value."

Instruction 25 (Record, page 97) reads as follows:

"When you are told in this charge that the burden of proof upon any issue is upon either party to this action, you are to understand that such party must present evidence for your consideration which preponderates over the evidence of the other party upon that issue; and if, after due consideration of all the evidence introduced by the party having the

burden of proof, it does not preponderate in his favor, but that the evidence of each party is equal, in your judgment, it is your duty to find such issue against the party having the burden of proof, under these instructions. In determining the weight of the evidence you are not to consider alone the number of witnesses which have been sworn in behalf of either party, but to take into consideration the circumstances under which the evidence was given, the character and standing of the witnesses, their appearance upon the witness stand, and all the circumstances of their evidence, and after such consideration, you are to determine the weight and preponderance of the evidence upon each issue in favor of one or the other of the parties to this suit."

The language of the Supreme Court of the United States in the opinion in the case of Etna Life Ins. Co. *vs.* Ward, 140 U. S., 76, is applicable to the objection made to instruction 5. The court said:

"The most important specification of error in the entire list is as follows: 'The court erred in charging the jury that the "weight of the testimony must decidedly preponderate on the side of the defendant." ' Objection is particularly made to the use of the word 'decidedly' in this connection. The argument is, that the effect of that part of the charge was to direct the jury to return a verdict for the plaintiff, unless the evidence introduced by the defendant to establish its defense should satisfy them, beyond a reasonable doubt, that the defense had been made out. The phrase 'decidedly preponderate' is not technically exact, with respect to the weight and quantity of evidence necessary and proper to justify a verdict in civil case. If, therefore, this clause of the charge stood isolated from any other part of it bearing upon the same subject-matter, there would be serious objection to it. But we think the immediate context, as above quoted, shows that no such meaning can be fairly derived from it as claimed by the defendant. On the contrary, such meaning is excluded in the same sentence, where the jury were told that 'such evidence need not be so convincing as to make the effect beyond reasonable doubt;' and then immediately follows the clause objected to. We think the clause, when taken in connection with the whole tenor and effect of the entire

charge, and especially in view of the immediate context, could not have misled the jury in the premises."

The plaintiff in error in its request to instruction No. XXII (Record, page 109) uses the expression "unless the plaintiff has *satisfied* you by a preponderance of the evidence." Again, in request No. XXVI (Record, page 110), we find this language: "This is so because the plaintiff must satisfy you by a preponderance of the evidence." It is quite evident that the objection now made to instruction 5 is an after-thought, and it is fair to presume that the use of the words "satisfy," "satisfied," and "satisfaction" in the charge was suggested by the plaintiff in error in the requests for instructions which it made. The words "satisfy," "satisfied," and "satisfaction" are used eleven times through the charge. In five instances one or the other of these words is used in referring to the proof required of the defendant in error. (See instructions 4, 11, 14, 17, and 31.) In instruction 31 the words "find," "satisfied," and "believe" are all used in the same sense.

In the case of Walker *vs.* Collins, decided by the Circuit Court of Appeals for the Eighth Circuit, 59 Fed., 70, 73, Circuit Judge Colville, in the opinion, said:

"The defendants excepted generally to this charge, and in this court limit the exception to the last clause of the charge, which states that 'it devolves upon him who alleges fraud to show the same by satisfactory proof, *i. e.*, proof to the satisfaction of the jury.' The objection to the charge is that the court should have told the jury that fraud may be established by a preponderance of the evidence, and not that it must be established by 'satisfactory proof, *i. e.*, proof to the satisfaction of the jury.' The charge is taken almost literally from the opinion of the Supreme Court of the United States in the case of Jones *v.* Simpson, 116 U. S., 609, 615. In that case the court said: 'It devolves on him who alleges fraud to show the same by satisfactory proof.' * * *

"In Bouvier's Law Dictionary (14th ed.) the term 'satisfactory evidence' is defined to be 'that evidence which is

sufficient to produce a belief that the thing is true; in other words it is credible evidence.' The Century Dictionary defines 'satisfactory evidence or sufficient evidence' to be 'such evidence as in amount is adequate to justify the court or jury in adopting the conclusion in support of which it is adduced.' No better definition of these terms can be given, and it was in this sense, presumably, that the jury understood them."

See also—

Treusch *vs.* Ottenburg, 54 Fed. Rep., 867, 877.
Callan *vs.* Hanson, 53 N. W. Rep. (Ia.), 282.
Peletier *vs.* Railroad Co., 88 Wis., 521, 528.
Winston *vs.* Burnell, 44 Kan., 367.
Carstens *vs.* Earls, 26 Wash., 676, 690.
Kenyon *vs.* City, 73 N. W. Rep. (Wis.), 314.
Sams, etc., Co. *vs.* League, 54 Pac. Rep. (Colo.), 642.
Suber *vs.* Mayfield, 60 N. E. Rep. (Ind.), 7.

In the case of Rogers *vs.* Marshall, 1 Wall., 644, it is said:

"A nice criticism of words will not be indulged when the meaning of the instruction is plain and obvious and cannot mislead the jury."

See also—

Baltimore & P. R. R. Co. *vs.* Mackey, 157 U. S., 86.

VI.

In the brief served in this cause a lengthy argument is made as to the sufficiency or insufficiency of the complaint in this case. No demurrer was filed to the second amended complaint. Answer was put in to the merits, thus waiving any formal objection, and by the affirmative answer admitting the sufficiency of the complaint. It has been held sufficient by the local courts twice, and we submit that it cannot now be raised on appeal or error. We refer to the language of the circuit court of appeals on the subject, quoted in the appendix to the plaintiff's brief.

VII.

Assertion is made by counsel on page 56 that the defendant in error relied for jurisdiction upon the fact that it was raising Federal questions, and did not rely upon diverse citizenship until the time the case came to this court. This is an assertion of fact by counsel which has no foundation in the record. We have for seven long years contended that there is no Federal question, and relied upon diverse citizenship in each and every trial. Four years ago that question was argued here on a motion to dismiss in this case.

We may say the same of all of brief of plaintiff in error, under heading "Material Facts Established by the Testimony," pp. 15-19. Most of these assertions are mere offers of proof.

VIII.

Long argument is made in brief of plaintiff in error (pp. 98-102) to show that the discovery vein of the St. Louis ran east and west and not north and south, as we alleged. That and the evidence of the witnesses for plaintiff in error is quoted. They show a question of fact to be determined by the jury; the verdict is a conclusive answer to it. The verdict was obtained under the conditions named in the charge of Judge Hunt, making it obligatory upon us to show that the vein ran northwesterly and southerly. This court will hardly sit here as a jury to retry that fact. If that evidence was called to your honors' attention, there would be no question but what you would agree to the jury. This is not an appeal in equity, with the evidence presented: the record does not pretend to present the evidence, but only such evidence as illustrates the exceptions taken.

IX.

A long sophistical argument is made upon the question of priority of the different claims. It is conceded that the St. Louis claim was located two years before the Nine Hour. It is conceded that the St. Louis claim was patented before

the Nine Hour, but because of this arrangement for the compromise strip and because of the subsequent suit and deed for the compromise strip, the plaintiff in error claims to antedate that part of the Nine Hour claim, so that it will be of the same date of the St. Louis. They say we deeded it to them as a part of the St. Louis, and therefore it must have the same date. It is the same old argument discussing the effect of that record; but the deed was not of a part of the St. Louis as such. It was a deed to determine the line of the Nine Hour, and the deed only left the grantee in possession of the compromise strip as a part of the Nine Hour. It could not antedate the location of the Nine Hour. It was Nine Hour ground before, it was Nine Hour ground all the time, and dates with the Nine Hour.

X.

Complaint is made that the plaintiffs were permitted to recover for a trifle of ore which the plaintiff in error had been enjoined from selling, but which had not been returned to the defendant in error. Upon that we think the opinion of the circuit court of appeals in 102 Federal Rep. most clearly illustrates the law, and we leave it as our brief. It is found at page 9 of the appendix to plaintiff's brief. What is said as to the condition of the record on that writ of error applies equally here.

We respectfully submit that this case should be dismissed, but, if not dismissed, affirmed.

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